

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

EUGENE SCALIA, <i>Secretary of Labor</i> ,)	
)	
Plaintiff,)	2:17-cv-880
)	
v.)	
SX MANAGEMENT, LLC, <i>a limited liability corporation doing business as STOREXPRESS</i> , STEVEN MITNICK, <i>individually, and as President and/or owner of SX Management, LLC</i> , and EDMOND MCKEAN, <i>individually and as an employee of SX Management, LLC</i> ,)	District Judge Marilyn J. Horan
)	Magistrate Judge Maureen P. Kelly
)	
Defendants.)	
)	
EDMOND MCKEAN, <i>individually and as an employee of SX Management, LLC</i> ,)	
)	
Cross Claimant,)	
)	
v.)	
STEVEN MITNICK, <i>individually, and as President and/or owner of SX Management, LLC</i> , and SX MANAGEMENT, LLC, <i>a limited liability corporation doing business as STOREXPRESS</i> ,)	
Cross Defendants.)	

Memorandum Opinion

This case was originally referred to United States Magistrate Judge Maureen P. Kelly for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(A) and (B), and Rule 72 for the Local Rules for Magistrate Judges. On June 16, 2021, Judge Kelly issued a Report and Recommendation, recommending that the Court deny in part and grant in part the Defendants', SX Management, LLC and Steven Mitnick (SX Defendants), Motion for Partial Summary Judgment. (ECF No. 122). Judge Kelly recommended that the Court deny the SX Defendants' Motion for Partial Summary Judgment with respect to the claims asserted by the

Plaintiff, Secretary of Labor Eugene Scalia, on behalf of Defendant-Cross Claimant Edmond McKean and she recommended granting the Motion for Partial Summary Judgment with respect to the cross-claim asserted by Mr. McKean. (ECF No. 122). The SX Defendants filed timely written Objections to the Magistrate Judge's recommendation that Mr. McKean can be classified as both an employer and employee under the Fair Labor Standards Act (FLSA). (ECF No. 123). The Secretary of Labor filed a timely Response to those Objections. (ECF No. 126). In addition, Defendant-Cross Claimant Mr. McKean filed a Response to Judge Kelly's Report and Recommendation and to the SX Defendants' Objections. (ECF No. 127). In said Response, Mr. McKean voluntarily consented to the dismissal of his cross-claim against the SX Defendants in its entirety. (ECF No. 127). As such, based upon Mr. McKean's consent to the dismissal of his cross-claim against the SX Defendants, said cross-claim will be dismissed with prejudice.

For the reasons that follow, and after *de novo* review, the Court finds that the written Objections do not undermine Judge Kelly's recommendation. The Court will adopt the Report and Recommendation as the Opinion of the Court as regards the claims asserted by the Secretary on behalf of Mr. McKean. The Court will not adopt the Report and Recommendation as regards the SX Defendants' Motion for Partial Summary Judgment concerning Mr. McKean's cross-claim for retaliation, because said claim is being dismissed with prejudice. Said Motion for Partial Summary Judgment will be denied as moot.

I. Discussion

The filing of timely objections requires the district judge to "make a *de novo* determination of those portions of the report . . . to which objection is made." 28 U.S.C. § 636(b)(1); *Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); Fed. R. Civ. P. 72(b)(3). The SX Defendants have articulated two Objections to the Magistrate Judge's Report and

Recommendation for why Mr. McKean cannot be simultaneously classified as both an employer and an employee under the FLSA. Initially, the Court finds no error in the Magistrate Judge's application of the standard of law. As for the specific Objections, each will be addressed in turn.

a. Mr. McKean Can Be Both an Employer and Employee Under the FLSA

The SX Defendants object, arguing that the FLSA prohibits Mr. McKean from being classified as both an employer and an employee in the context of the present lawsuit. (ECF No. 123, at 5). Judge Kelly reasoned that Mr. McKean can be both an employer and an employee because he acted as both an employer of the Schedule A employees and as an employee of SX Management. (ECF No. 122, at 19). The Schedule A employees were employees of a separate company owned by Mr. McKean. (ECF No. 122, at 3-4). There is no prohibition under the FLSA or any applicable caselaw that prevents an individual from being both an employer and an employee under the FLSA. (ECF No. 122, at 13). Judge Kelly correctly recommended that there is no limitation within the FLSA that prevents Mr. McKean from being simultaneously classified as both an employer and an employee in the circumstances of this case. (ECF No. 122, at 13). Mr. McKean acted as a supervisory employee at SX Management, and as the Secretary of Labor points out in his Response to the SX Defendants' Objections, a supervisory employee can be considered both an employer and employee under the FLSA. (ECF No. 126, at 2). The SX Defendants cited no case law, other than what they cited in their initial Briefings, to support their argument that Mr. McKean cannot be classified as both an employer and an employee under the FLSA. As such, the SX Defendants' Objection, arguing that Mr. McKean cannot be both an employer and an employee simultaneously under the FLSA, will be overruled.

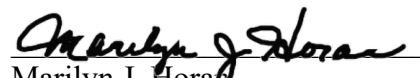
b. The Magistrate Judge Correctly Considered Analogous Case Law in Reaching Her Decision

The SX Defendants next object that Judge Kelly erred in failing to correctly consider applicable FLSA and Title VII caselaw in reaching her decision. (ECF No. 123, at 7). In her Report and Recommendation, Judge Kelly discussed the case of *Whited v. The New Café at Greystone Gardens*, Civil Action No. 3:18-1811, 120 WL 1271681 (M.D. Pa. Mar. 17, 2020); however, she correctly recommended that the *Whited* holding does not apply to the present case. (ECF No. 122, at 15-17). *Whited* only applies within the context of tip sharing employment circumstance. Judge Kelly also correctly observed that the definition of an employee under Title VII is different from the definition of an employee in the FLSA context. (ECF No. 122, at 18). Because Judge Kelly's Report and Recommendation considered and correctly ruled upon factors to distinguish the *Whited* and Title VII cases raised by the SX Defendants, the SX Defendants' Objections are overruled.

II. Conclusion

Following a thorough review of the record, the Court concurs with and accepts Judge Kelly's Report and Recommendation. The SX Defendants' Motion for Partial Summary Judgment will be denied as to the issue of whether Mr. McKean can be both an employer and employee under the FLSA. The SX Defendant's Motion for Partial Summary Judgment will be denied as moot with respect to Mr. McKean's dismissed cross-claim against the SX Defendants. A separate Order to follow.

DATE: July 20, 2021


Marilyn J. Horan
United States District Judge

cc: Honorable Maureen P. Kelly
United States Magistrate Judge

All Counsel of Record via CM-ECF